

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of SBC Communications Inc.)	WC Docket No. 04-29
for Forbearance from the Application of Title II)	
Common Carrier Regulation to IP Platform)	
Services)	

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 2005**Released: May 5, 2005**

By the Commission: Chairman Martin and Commissioner Abernathy issuing separate statements; and
Commissioners Copps and Adelstein issuing a joint statement.

I. INTRODUCTION

1. In this Order we address a petition filed by SBC Communications Inc. (SBC) requesting that the Commission forbear from the application of “Title II common carrier regulations” as contained in the Communications Act of 1934, as amended (the Act),¹ to “IP Platform Services.”² For the reasons set forth below, we deny SBC’s petition. We find that the petition is procedurally defective because it asks us to forbear from the application of statutory provisions and regulations that “may or may not” apply to the telecommunications carrier or telecommunications service at issue. In addition, the evidence and arguments set out in SBC’s petition and subsequent pleadings are insufficiently specific to permit a finding that forbearance is appropriate.

II. BACKGROUND

2. On February 5, 2004, SBC filed its petition seeking forbearance from Title II common carrier regulation applicable to “IP Platform Services,” which SBC defines as “those services that enable any customer to send or receive communications in IP format over an IP platform, and the IP platforms

¹ 47 U.S.C. § 151 *et seq.*

² Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29 (filed Feb. 5, 2004) (SBC Forbearance Petition). On December 7, 2004, the Wireline Competition Bureau extended by 90 days, to May 5, 2005, the date by which the petition requesting forbearance shall be deemed granted in the absence of a Commission decision. *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, Order, 19 FCC Rcd 23685 (Wireline Comp. Bur. 2004). Along with its petition for forbearance, SBC simultaneously filed a petition for declaratory ruling in which it asked the Commission, *inter alia*, to declare that IP Platform Services fall outside the scope of Title II. *Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services* (filed Feb. 5, 2004) (SBC Decl. Rul.). SBC’s petition for declaratory ruling has been incorporated into the Commission’s current *IP-Enabled Services* proceeding. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4884, para. 32 & n.110 (2004).

on which those services are provided.”³ SBC states that its petition does not cover “legacy” incumbent local exchange carrier facilities that are currently regulated under Title II.⁴ SBC does not concede that Title II currently applies to IP Platform Services, as evidenced by its filing of a simultaneous petition for a declaratory ruling that IP Platform Services are exempt from Title II regulation.⁵ Rather, SBC asks the Commission to forbear from enforcing Title II common carrier regulation *to the extent* that these provisions might be found to apply to IP Platform Services.⁶ SBC also suggests that the Commission may use its authority under Title I to impose on IP Platform Services “whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service, public safety/E911, communications assistance for law enforcement, and disability access.”⁷

III. DISCUSSION

3. SBC asks the Commission to forbear from applying Title II common carrier regulation to IP Platform Services. We find that it would be inappropriate to grant SBC’s petition because it asks us to forbear from requirements that may not even apply to the facilities and services in question. We also find that SBC’s petition and the evidence proffered is not sufficiently specific to enable us to determine whether the requested forbearance satisfies the requirements of section 10.

4. *Forbearance From Statutory Provisions Only to the Extent That They Are Found to Apply.* SBC’s petition asks us to forbear from applying Title II of the Act to IP Platform Services. However, SBC does not concede in its petition that Title II currently applies to those services. In fact, SBC repeatedly characterizes its petition for forbearance as a “modest additional step” intended to accompany a decision by the Commission to characterize IP-enabled services as information services.⁸ SBC thus acknowledges, in its forbearance petition as well as its petition for declaratory ruling,⁹ that the Commission has not yet decided the extent to which IP-enabled services are covered by Title II and its implementing rules. SBC’s petition therefore seeks forbearance from application of Title II regulation only “to the extent that such regulation might otherwise be found to apply” to IP Platform Services.¹⁰

³ SBC Forbearance Petition at i.

⁴ *Id.* at 2.

⁵ *See supra* n.2.

⁶ SBC Forbearance Petition at 2.

⁷ *Id.*

⁸ *See, e.g.*, SBC Reply at 2.

⁹ *See supra* n.2.

¹⁰ SBC Forbearance Petition at 2. We note that in its petition, SBC analogizes the relief it seeks here to the actions the Commission took in the *Cable Modem Declaratory Ruling*, in which the Commission classified cable modem service as an interstate information service, then tentatively concluded that it would be appropriate to forbear from applying Title II regulations to cable modem service, to the extent that cable modem service may be subject to classification as a telecommunications service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4847-48, para. 95 (2002) (*Cable Modem Declaratory Ruling*), *aff’d in part, vacated in part, and remanded*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *cert. granted sub nom. National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S.Ct. 654 (2004). We believe that SBC relies too heavily on a mere tentative conclusion: the Commission has never actually forbore from applying any provision of Title II to cable modem service, which makes SBC’s reliance on the *Cable Modem*

(continued....)

5. We conclude that section 10 neither contemplates nor permits grants of forbearance relating to obligations that “may or may not” apply to the telecommunications carrier or telecommunications service at issue.¹¹ Consequently, that section’s provisions do not govern petitions seeking such relief. We find that the word “forbear” in section 10 of the Act means “to desist from; cease.”¹² Accordingly, section 10 contemplates that the Commission may forbear from applying pertinent regulations or statutory requirements only to the extent that they apply. In fact, it would be impossible to “forbear from applying [a] regulation or [a] provision of this Act” that does not apply.¹³ We find that this interpretation is most consistent with prior decisions by the Commission and the U.S. Court of Appeals for the D.C. Circuit, the advocacy of parties in other proceedings, the aims of the statute and the integrity of the administrative process, and promotion of efficient use of agency resources.

6. Moreover, we find that the grant of a petition seeking forbearance from a requirement that does not unambiguously apply is contrary to the public interest, and therefore does not satisfy the requirements for granting forbearance under section 10(a)(3) of the Act. It is not in the public interest to forbear from requirements before the Commission has fully considered whether and under what technical conditions the requirements apply in the first place. To do so could preclude fully considered analysis, particularly in light of the statutory deadline for acting on forbearance petitions. The opposite conclusion would effectively impose a deadline for the Commission to rule on the appropriate regulatory treatment of IP-enabled services. In addition, it is not in the public interest for the Commission to devote resources to determine whether to forbear from imposing or enforcing requirements that might not even apply.

7. The Commission has previously acted in a manner consistent with our conclusion here. In 1998, BellSouth and other carriers sought forbearance from a rate integration requirement pertaining to providers of Commercial Mobile Radio Services (CMRS).¹⁴ After that petition was filed, the D.C. Circuit vacated and remanded the order setting out the requirement at issue but left undecided the issue of

(...continued from previous page)

Declaratory Ruling less than convincing. Furthermore, SBC suggests that its request for forbearance is merely a request for an “additional step,” similar to the action we took in the *Cable Modem Declaratory Ruling* to ensure a uniform national policy. SBC Forbearance Petition at 2. We are not persuaded by this rationale, however, because SBC filed its petition for forbearance before the Commission initiated its *IP-Enabled Services* proceeding. It is therefore unconvincing for SBC to attempt to characterize its petition as a backstop to a Commission rulemaking. The breadth of SBC’s petition bears little resemblance to the circumstances under which the Commission has forbore or tentatively concluded to forbear as a relatively narrow part of a comprehensive regulatory action. See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, para. 95; *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23711, paras. 34-35 (2003).

¹¹ This is not to suggest that all legal obligations with respect to IP-enabled services are ambiguous or undecided. See, e.g., *Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7465-67, paras. 12-15 (2004) (declaring that AT&T’s “phone-to-phone IP telephony” service is a telecommunications service subject to interstate access charges); *Petition for Declaratory Ruling That pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3311, para. 8 (2004) (declaring that pulver.com’s Free World Dialup service is an unregulated information service subject to federal jurisdiction).

¹² See <http://dictionary.reference.com/search?q=forbear>.

¹³ 47 U.S.C. § 160(a).

¹⁴ See *Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket No. 96-61, Memorandum Opinion and Order, 15 FCC Rcd 21066, 21067, para. 4 (2000) (*Rate Integration Forbearance Order*).

whether the rate integration requirement could be applied to CMRS carriers.¹⁵ Following the court's decision, the Commission dismissed BellSouth's forbearance request, noting that "there is currently no rate integration rule to apply to CMRS carriers and [thus] no rule to forbear from applying." For this reason, the Commission found, the petition was "premature."¹⁶

8. In *USTA v. FCC*,¹⁷ the D.C. Circuit considered competitive LECs' arguments that the Commission's decision not to promulgate particular requirements under the Act constituted an improper grant of forbearance from application of section 251's requirements. The court rejected this argument, noting that "[section 10], prescribing when the Commission may forbear from applying statutory requirements, obviously comes into play only for requirements that exist."¹⁸ The court explained that the Commission was authorized to determine in the first instance whether the Act mandated the requirements sought by the competitive LECs.¹⁹ Similarly, during the course of litigation regarding another Commission forbearance decision, Verizon argued to the D.C. Circuit that "[t]here can be no forbearance until the Commission first establishes the existence of a statutory obligation to forbear *from*."²⁰ In its decision resolving the case, the D.C. Circuit appeared to concur, quoting Verizon's argument and concluding that the existence of an obligation is a logical predicate to relief under section 10, rather than a ground for denying such relief.²¹

9. We acknowledge, and reaffirm here, the importance of forbearance as a critical complement to the other means by which the Commission may remove existing requirements that have been rendered unnecessary by market developments.²² Nonetheless, an interpretation permitting petitions seeking such relief would regularly require us to prejudge important issues pending in broader rulemakings and otherwise distort the Commission's deliberative process. For example, SBC itself has argued, in opposition to a petition for forbearance recently withdrawn by Level 3,²³ that by trying to force Commission action within the statutory deadlines of section 10, Level 3 sought "to jump out ahead of the Commission on intercarrier compensation reform by obtaining a quick, self-serving fix on one intercarrier compensation issue without the slightest regard for how such piecemeal relief would complicate

¹⁵ *GTE Service Corp. and Micronesian Telecommunications Corp. v. FCC*, 224 F.3d 768 (D.C. Cir. 2000).

¹⁶ *Rate Integration Forbearance Order*, 15 FCC Rcd at 21068, paras. 6-7.

¹⁷ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

¹⁸ *Id.* at 579.

¹⁹ *Id.*

²⁰ *Verizon v. FCC*, Reply Brief for Petitioners Verizon Telephone Companies, D.C. Cir. No. 03-1396 (filed Feb. 11, 2004). AT&T has argued that petitions seeking forbearance prior to the establishment of a baseline obligation are "fatally premature," because when "the Commission has yet to identify the regulatory framework that will govern the various services at issue [in the petition], it cannot conduct a meaningful analysis of the forbearance criteria." AT&T Comments at 7.

²¹ *See Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1234 (D.C. Cir. 2004).

²² *See, e.g., AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) ("Congress has established § 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different, regulatory mechanism.").

²³ Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266, Petition for Forbearance (filed Dec. 23, 2003); *see also* Letter from John T. Nakahata, Counsel for Level 3 Communications LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-266 (filed Mar. 21, 2005) (withdrawing Level 3's petition).

resolution of all the other issues to which this one issue is inextricably tied.”²⁴ We agree with SBC that forbearance petitions seeking this kind of relief are likely to disrupt the course of the Commission’s decisionmaking process by placing certain aspects of complex and comprehensive regulatory problems, but not others, on especially demanding, statutorily prescribed “one year . . . [plus] 90 day[]” schedules.²⁵ We believe that the instant petition falls into the same category. While the Commission might sometimes choose to grant the relief sought by parties in the form of interim rules, permanent rules, or declarations regarding existing law, a framework permitting parties to compel a forbearance decision within the period set out in section 10(c) would unduly cabin the Commission’s discretion in considering both whether and when to modify discrete aspects of the regulatory regime, and could well stymie comprehensive reform. We do not believe that Congress, in framing section 10, could have intended this result, given the absence of specific deadlines for rulemaking proceedings in the statute.²⁶ Moreover, such an interpretation would require the Commission to do more than section 10 requires. It would require us to decide whether a requirement applies in the first place, and, if so, decide whether to forbear from such requirement. This goes beyond what Congress required the Commission to complete within the statutory deadline set forth in section 10.

10. We also believe that granting forbearance petitions “to the extent” that particular regulations might otherwise apply would create serious administrability concerns and would threaten the Commission’s ability to determine its own priorities and set its own agenda. If we interpret section 10 to permit forbearance petitions such as SBC’s, the result could be the filing of multiple petitions relating to the same topic, all with different statutory deadlines. This result would complicate and hinder the Commission’s decisionmaking process enormously, as we would be forced to delay ongoing rulemaking efforts in order to address one forbearance petition after another.

11. In addition, as explained above, such a framework would likely lead to petitions posing hypothetical questions regarding real or imagined services. Each of these petitions would necessitate resolution within the “one year . . . [plus] 90 day[]” period described in section 10(c), and would automatically be deemed granted after that period in the absence of a Commission order evaluating the merits of forbearance from the relevant (but hypothetical) obligation or obligations. This approach would greatly and unnecessarily strain the Commission’s resources, which would be diverted from actual regulatory controversies of concrete consequence to theoretical disputes with disparate deadlines for resolution.²⁷ We do not believe that Congress intended this result.²⁸

12. The statutory purposes animating the 1996 Act generally, and section 10 in particular, support an interpretation barring grants of forbearance from obligations that may or may not otherwise

²⁴ Letter from James C. Smith, Senior Vice President, SBC, to Michael K. Powell, Chairman, FCC, WC Docket No. 02-366 (filed Feb. 3, 2005).

²⁵ 47 U.S.C. § 160(c).

²⁶ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”); *United States v. Wilson*, 290 F.3d 347, 361 (D.C. Cir. 2002) (noting that “absurd results” are “strongly disfavored” in construing statutes).

²⁷ In fact, SBC’s situation approaches this scenario: while its IP networks are not imaginary or theoretical, the company has yet to roll them out to consumers.

²⁸ See, e.g., *AT&T Corp. v. FCC*, 220 F.3d 607, 630 (D.C. Cir. 2000) (upholding the Commission’s reference to administrability concerns in interpreting a provision of the Act, and citing the Commission’s discretion with regard to “judgment[s] about the most efficient way to proceed in . . . complex administrative matter[s]”).

apply. As we have previously noted, the primary purpose of the 1996 Act was to establish “a pro-competitive, deregulatory national policy framework designed to make available to all Americans advanced telecommunications and information technologies and services by opening all telecommunications markets to competition.”²⁹ Section 10, as we have stated, constitutes “an important tool to realize this [deregulatory] goal.”³⁰ A legal framework that allowed grants of forbearance “to the extent” that a particular regulation *might* apply would invite forbearance requests seeking to ensure that a wide range of actual and hypothetical services be rendered immune from the entire panoply of regulatory requirements that might apply to such services. Commission action in response to forbearance petitions under these circumstances, to be decided within the condensed time frame specified by the statute, could result in rushed, and potentially poor, decisions. We do not believe that such a regime, which would increase rather than decrease the Commission’s scrutiny of new and developing services and markets, is consistent with the purposes of section 10 or the 1996 Act.

13. For the reasons stated above, we conclude that petitions such as the instant petition, which seek forbearance of regulatory requirements to whatever extent those requirements might otherwise apply, are procedurally improper and need not be evaluated under the section 10 framework. We therefore deny SBC’s petition.

14. *Scope of SBC’s Petition.* We also deny SBC’s petition for the independent reason that it is not sufficiently specific to determine whether the requested forbearance satisfies the requirements of section 10. We are unable to determine with certainty which services and facilities SBC’s petition is meant to cover, as well as the specific statutory and regulatory provisions from which SBC seeks forbearance. As noted above, SBC defines “IP Platform Services” as “those services that enable any customer to send or receive communications in IP format over an IP platform, and the IP platforms on which those services are provided.” SBC does not define the term “IP platform” in its petition. In subsequent *ex parte* filings SBC suggested that, at least with regard to the facilities portion of the relief requested, its petition is intended to cover newly constructed fiber-to-the-node and fiber-to-the-home IP networks that SBC plans to roll out later this year.³¹ SBC distinguishes between these new fiber facilities and its “legacy” ATM networks, indicating that its petition seeks forbearance from Title II only with respect to the former, not to the latter.³² However, elsewhere SBC appears to request forbearance for *services* that can ride over legacy networks, such as “broadband Internet access – in the form of . . . digital subscriber line service.”³³

15. In short, SBC’s petition and subsequent pleadings do not identify with sufficient precision the facilities and services its request for forbearance is meant to include. Without a clear understanding of the scope of the petition, we cannot determine whether SBC’s request for forbearance satisfies the criteria of section 10(a). Granting SBC’s petition would create the very type of regulatory

²⁹ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement).

³⁰ 2000 *Biennial Regulatory Review*, IB Docket No. 00-202, Notice of Proposed Rule Making, 15 FCC Rcd 20008, 20010, para. 2 (2000).

³¹ Letter from James K. Smith, Executive Director, Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-29, at 2 (filed Feb. 11, 2005) (SBC Feb. 11 *Ex Parte* Letter); *see also* Almar Latour, *To Meet the Threat From Cable, SBC Rushes to Offer TV Service*, WALL ST. J. Feb. 16, 2005, at A1.

³² SBC Reply at 10-13; SBC Feb. 11 *Ex Parte* at 2. In its petition for declaratory ruling, SBC seeks a declaration that IP Platform Services fall outside Titles II, III, and VI. SBC Decl. Rul. at 2.

³³ SBC Decl. Rul. at 32 n.63.

uncertainty that SBC purportedly seeks to avoid.³⁴ The relief that SBC seeks in its petition is not limited to its own facilities; it would extend to all IP Platform Services, not just SBC's.³⁵ The scope of SBC's petition is therefore potentially very broad. The same lack of clarity that makes it impossible for us to conduct a section 10(a) analysis would also make it difficult for other carriers to determine whether their own IP-based services fall under SBC's definition of IP Platform Services.³⁶ We would be inviting a barrage of similar petitions, which would wreak havoc on the Commission's ability to conduct efficient and effective rulemakings in an area of dynamic technical evolution.³⁷ For these reasons, we cannot grant a petition such as SBC's, where the facilities and services for which the petitioner seeks forbearance are so nebulously defined.³⁸

16. Similarly, SBC states that its petition is intended to apply only to the "common carrier" provisions of Title II,³⁹ but never clearly identifies which specific provisions of Title II this limitation is meant to exclude. In its comments in the *IP-Enabled Services* proceeding, SBC does identify three provisions of Title II that are not limited to common carriers: section 251(e) (numbering), section 254 (universal service), and section 255 (disability access).⁴⁰ But nowhere on the record in this proceeding does SBC say whether this is meant to be a comprehensive list of the provisions of Title II that it means to exclude from its petition, or merely three examples. At the same time, SBC states in its petition that the Commission can exercise its authority under Title I to fashion "whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service . . . and disability access."⁴¹ This language suggests that SBC *does* seek forbearance from the sections of Title II relating to universal service and disability access; otherwise, there would be no need to suggest the use of Title I authority to reinstate all or part of those obligations. We are thus unable, on the record in this proceeding, to identify precisely which provisions of Title II are covered by SBC's petition and which are not.⁴² This degree of uncertainty with respect to the intended scope of SBC's petition would make it difficult, if not impossible, to determine that the three prongs of section 10(a) have been satisfied.⁴³

³⁴ SBC Forbearance Petition at 2-4.

³⁵ SBC Forbearance Petition at 8 ("Forbearance is appropriate with respect to *all* IP platform services. Title II regulation of some but not all IP platform services would be inherently impractical.") (emphasis in original).

³⁶ See Earthlink Comments at 2 (noting that "IP Platform" is not clearly defined in SBC's petition).

³⁷ See *supra* paras. 10-11.

³⁸ At the same time, if we were to grant SBC's petition solely with respect to SBC's own IP-based services, which it has identified more precisely, we would create an equal risk of disparate treatment of comparable or identical IP-enabled services, which SBC itself states is an undesirable outcome. See *supra* n.35.

³⁹ SBC Forbearance Petition at 1; SBC Reply at 8 n.17.

⁴⁰ SBC *IP-Enabled Services* Comments at 50-52.

⁴¹ SBC Forbearance Petition at 2.

⁴² In addition, it is unclear whether SBC's petition for forbearance from Title II regulations is meant to encompass the Commission's *Computer II* and *III* rules. Compare SBC Forbearance Petition at 1 (making no mention of the *Computer II* and *III* rules), with Letter from James K. Smith, Executive Director, Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-29, at 17 (filed Oct. 21, 2004) (suggesting that those rules may have been included in SBC's request for forbearance).

⁴³ While we do not conduct a substantive analysis of SBC's petition under section 10(a), we note that SBC's suggestion that the Commission might choose to promulgate rules under Title I to achieve certain public policy objectives identified in Title II tends to indicate that it would be contrary to the public interest to forbear from those provisions of Title II in the first place. See AT&T Comments at 21.

17. Finally, we note that SBC fails to acknowledge that the Commission has never forbore from applying sections 201 and 202 of the Act.⁴⁴ In a 1998 order denying a petition for forbearance from sections 201 and 202 of the Act (among other sections), the Commission described those sections as the cornerstone of the Act.⁴⁵ The Commission explained that even in substantially competitive markets, there remains a risk of unjust or discriminatory treatment of consumers, and sections 201 and 202 therefore continue to afford important consumer protections.⁴⁶ Because the language of section 10(a) essentially mirrors the language of sections 201 and 202, the Commission expressed skepticism that it would ever be appropriate to forbear from applying those sections.⁴⁷ Since then, the Commission has never granted a petition for forbearance from sections 201 and 202. If we were to grant such a petition now, we would have to provide a rationale for abandoning our own precedent.⁴⁸ It thus stands to reason that a petitioner seeking forbearance from sections 201 and 202 – either independently or as part of a broader request – should be obligated to explain in detail why the Commission should forbear from those sections even though it has never done so before. SBC has not done so.

IV. EFFECTIVE DATE

18. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Thursday, May 5, 2005.⁴⁹ The time for appeal shall run from the release date of this order.⁵⁰

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that the petition for forbearance of SBC Communications Inc. IS DENIED as set forth herein.

⁴⁴ See AT&T Comments at 19-20; Earthlink Comments at 10-11.

⁴⁵ *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998).

⁴⁶ *Id.* at 16868-69, para. 23.

⁴⁷ *Id.* at 16867, para. 19 (“[I]n arguing for forbearance from applying sections 201 and 202, PCIA necessarily contends that in order to ensure that broadband PCS providers’ charges, practices, classifications, and regulations are just, reasonable, and not unjustly or unreasonably discriminatory, we need not require that those charges, practices, classifications, and regulations be just, reasonable, and not unjustly or unreasonably discriminatory.”); see also *Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003) (noting that although the Commission found that the competitiveness of the commercial mobile radio service (CMRS) market justified exempting CMRS carriers from the tariffing requirements of section 203 of the Act, the Commission has nonetheless declined to exempt CMRS from sections 201 or 202).

⁴⁸ See *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (remanding a Commission denial of a forbearance petition because the Commission had deviated from its own precedent without adequately explaining why it had done so).

⁴⁹ See 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a) (“The Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action.”).

⁵⁰ 47 C.F.R. §§ 1.4 and 1.13.

20. IT IS FURTHER ORDERED, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on May 5, 2005. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**APPENDIX
LIST OF COMMENTERS**

Comments in WC Docket No. 04-29

<u>Comments</u>	<u>Abbreviation</u>
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
Cbeyond Communications, LLC	Cbeyond
Covad Communications	Covad
EarthLink, Inc.	Earthlink
Globalcom, Inc.	Globalcom
MCI, Inc.	MCI
Mpower Communications, Corp.	Mpower
National Association of State Utility Consumer Advocates	NASUCA
National Exchange Carrier Association, Inc.	NECA
National Telecommunications Cooperative Association	NTCA
Sprint Corporation	Sprint
United States Department of Justice	DOJ
United States Telecom Association	USTA
Time Warner Telecom	TWTC
Verizon Telephone Companies	Verizon

Replies in WC Docket No. 04-29

<u>Replies</u>	<u>Abbreviation</u>
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
BellSouth Corporation	BellSouth
Cingular Wireless LLC	Cingular
Consumer Federation of America/Consumers Union	CFA/CU
Covad Communications	Covad
CTC Communications Corp.	CTC
EarthLink, Inc.	EarthLink
MCI, Inc.	MCI
National Exchange Carrier Association, Inc.	NECA
Pac-West Telecomm, Inc	Pac-West
SBC Communications Inc.	SBC
United States Telecom Association	USTA
Verizon Telephone Companies	Verizon

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29

Although, by today's action, we deny SBC's forbearance petition on procedural grounds, I believe that the issues presented by this petition are important ones that require the Commission's attention. In the instant item, the Commission concluded that we were unable to forbear from Title II requirements that "may or may not" apply to IP platform services. As I have said on many occasions, and reiterate now as Chairman, investment in broadband facilities, such as the IP platforms at issue here, is critical to providing American consumers with 21st century advanced services.

Accordingly, in order to accomplish what will be one of the Commission's core priorities – promoting the deployment of new packetized networks throughout the nation – we should move forward to address the creation of a level-playing field for the provision of advanced services by similarly situated service providers. The removal of legacy regulations should spur investment and the deployment of new packetized networks and facilities that will bring new broadband services to all Americans throughout the nation.

I look forward to working with my colleagues in the upcoming months as we tackle these critical issues together.

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Petition of SBC Communications, Inc. for Forbearance from the Application of Title II
Common Carrier Regulation to IP Platform Services, Memorandum Opinion and Order, WC
Docket No. 04-29 (May 5, 2005).*

I support the foregoing order denying SBC's forbearance petition on procedural grounds. The task of developing new rules to govern the transition to 21st century fiber-based networks is among the most important facing the Commission. As the order reflects, however, the Commission has not yet determined the extent to which legacy regulatory rules should apply to the emerging class of IP-enabled services, and this petition was not the proper vehicle for doing so. The Commission is in the midst of a comprehensive rulemaking proceeding to establish a regulatory framework for IP-enabled services, and that rulemaking will better enable the Commission to consider the far-reaching and complex implications of whatever rules we adopt.

Although I agree that section 10 does not compel the Commission to grant blanket forbearance from the statute in these circumstances, I have little doubt that SBC is correct in contending that IP-enabled services should not be subject to the full range of Title II regulations. I hope the Commission promptly completes the pending rulemaking and defines an appropriately light-handed regulatory framework that reflects the new technological and marketplace realities.

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN**

Re: *Petition of SBC Communications Inc. for Forbearance from the Application of Title II
Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, WC
Docket No. 04-29 (May 5, 2005)

In Section 10 of the Communications Act, Congress provided the Commission with the authority to forbear from application of statutory or regulatory provisions in order to “promote competition in provision of telecommunications service.” To exercise this authority, the Commission must find that enforcement of the statute or its regulations is not necessary to ensure against discriminatory behavior and is not necessary for the protection of consumers. In addition, the Commission must find that forbearance is in the public interest.

The petition in the instant proceeding procedurally misses the mark. It falls short of defining the specific services for which relief is sought, the statutory and regulatory provisions at issue, the carriers to which this relief applies and the geographic markets where this relief is directed. Without this kind of data and information, the Commission is unable to apply the test laid out by Congress in Section 10. Moreover, a petitioner seeking forbearance from key provisions of the Act—like Sections 201 and 202—bears a heavy burden under Commission precedent. The petition before us lacks the detail necessary to meet this burden. We support the outcome of today’s decision but we write separately to emphasize that we find the insufficiency of the record before us is the appropriate basis for denying this petition.

We have some concerns about the remainder of the Order, which suggests that the Commission may not forbear from requirements that “may or may not” apply. This Order should not be read to make any particular determinations about whether specific requirements apply to IP-enabled services. Although we have reservations about the potential for confusion created by this language, we support the decision because it is superior to Commission inaction. Failure to issue a decision would have resulted in an automatic grant of this petition, a result that we find untenable in light of the record before us.